

THE HONORABLE TANA LIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUBSPACE OMEGA, LLC,

Plaintiff,

v.

AMAZON WEB SERVICES, INC.,

Defendant.

No. 2:23-cv-01772-TL

JOINT STATUS REPORT AND
DISCOVERY PLAN

Pursuant to Federal Rule of Civil Procedure 26(f), Local Civil Rule 26(f), and the Court's February 23, 2024 Order (Doc. No. 21), Plaintiff Subspace omega, LLC ("Subspace") and Defendant Amazon Web Services, Inc. ("AWS") submit the following Joint Status Report and Discovery Plan.

1. Nature and Complexity of the Case

Plaintiff's Statement

Subspace brings this action under, *inter alia*, Section 2 of the Sherman Act for monopolization and attempted monopolization. AWS is the largest cloud computer platform in the world. Subspace was created to provide network optimization services to firms such as Epic

Games, that used the AWS cloud but needed better low latency¹ connections with its customers playing games such as Fortnite. AWS had its own network optimization services, but they were inferior to Subspace's services. The foundation for effective low latency connections on AWS's network and the network of other cloud providers is "peering," which is a means of exchanging internet data directly between an origin network and a destination network. Peering bypasses intermediate internet exchange points, which results in more efficient and speedy connections. Peering benefits both AWS and Subspace's clients. As Subspace grew, Subspace also threatened AWS's dominance in the cloud market. A fully functioning Subspace would have enabled AWS customers to easily migrate their data to other cloud providers, undercutting the AWS business model designed to keep clients captive using AWS.

Once AWS determined that Subspace was an actual and potential rival to its monopoly, AWS used its dominant position to exclude Subspace from its cloud. After initially agreeing to peer with Subspace, AWS suddenly refused to permit further peering and began working to remove the peering connections with Subspace to which it had already agreed. Service to Subspace's biggest customer, Epic, was degraded to the point where Subspace could no longer provide the low latency connections it had been hired to achieve for gamers playing Fortnite, leading to the demise of Subspace. AWS then replaced Subspace as Epic's network optimization service provider but provided inferior service.

Subspace will be amending its complaint to provide a fuller description of the anticompetitive restraints of trade imposed by AWS.

Defendant's Statement

This is a straightforward case about a single business relationship in the Middle East that Subspace has attempted to turn into a U.S. antitrust claim. The case arises from Subspace's

¹ "Latency" refers to the time that it takes for a data packet to travel from its origin to its destination (for example, from a gamer to the server, or vice versa. The lower the latency, the faster the data packet will reach its destination. Low latency is crucial in keeping customers of gaming platforms satisfied and playing. Gamers who encounter high latency often lose their game and are discouraged from playing that game again.

1 demand that AWS supply Subspace with unlimited free connections to AWS's network
 2 anywhere in the world based on AWS having previously connected Subspace to its network for
 3 free in the Middle East. That connection in the Middle East was set up for the benefit of Epic
 4 Games, the parties' mutual customer. Elsewhere, AWS offered to connect to Subspace's network
 5 on standard terms, never refused to connect to Subspace's network, and never terminated
 6 Subspace's existing connection. Subspace indicates that Epic Games was its only large customer,
 7 and alleges that it went out of business after terminating its contract with Epic Games.

8 Subspace also asserts a Communications Act claim, which ignores existing law and seeks
 9 to apply a proposed regulation that is not yet in force and, even if adopted in the future, would
 10 not apply retroactively. Even if the case goes forward to discovery, this claim would require
 11 minimal discovery before resolution.

12 AWS has filed a Motion to Dismiss and contends that none of Subspace's claims have
 13 merit. *See* ECF No. 23.

14 **2. Consent to Magistrate Judge**

15 No.

16 **3. Deadline for Joining Additional Parties**

17 The parties agree that the deadline for joining parties should be 28 days after the
 18 Scheduling Order is entered.

19 **4. Class Action**

20 N/A

21 **5. Exempt Case**

22 N/A

23 **6. Discovery Plan**

24 **A. Initial Disclosures**

25 The parties exchanged Initial Disclosures on April 5, 2024.
 26

B. Subjects, Timing, and Potential Phasing of Discovery

The parties disagree about when discovery should begin and the subjects that would need to be covered. Their separate positions are stated below. The parties do not propose to phase discovery at this time, but AWS reserves the right to propose phasing if the case proceeds following the Court's ruling on AWS's pending Motion to Dismiss.

Plaintiff's Statement

Subspace objects to AWS's attempt to argue legal issues in this report rather than just identifying the status of disputes that need to be resolved. Until 4:00 pm on April 19, 2024, AWS withheld the portions of their inputs to the Report that included the argument that they now set forth in their sections of the Report, providing Subspace insufficient time to respond.

Pursuant to this Court's Order, the parties participated in a telephonic conference on March 22, 2024, at 2:00 pm ET to discuss the issues related to the Rule 26(f) report. Defendant AWS agreed to draft the initial report and provide it to Plaintiff's Counsel. At 7:14 pm ET on April 16, 2024, 25 days later, AWS's Counsel provided a draft of the Joint Status Report with several key sections of Defendant's position missing.

Plaintiff's Counsel revised its portion of the report in less than two days and provided all of its inputs to the Joint Status Report at 5:23 pm ET on April 18, 2024. At 4:00 pm ET on April 19, 2024, on the eve of filing, AWS's Counsel provided its missing sections, which initially constituted two briefs – one arguing against any discovery until the Motion to Dismiss is resolved, and the other briefing its argument against Plaintiff's request for discovery beyond the limitations set forth in the Federal Rules. This was the first time that AWS included any case citations and legal argument in their sections of the Report. The extensive legal arguments inserted into the report at the last minute by AWS's Counsel did not provide sufficient time for Plaintiff's Counsel to properly review and respond to AWS's position regarding discovery. After Plaintiff's Counsel objected to the briefing, some of it was removed, but certain legal arguments and citations remain.

1 Plaintiff considers this report to be just that – a report of positions, and not an opportunity
 2 to brief various contentions regarding those positions. If AWS wants to brief these various
 3 issues, then the parties should agree to a proper briefing schedule with deadlines and a full
 4 vetting of the issues. This Report is not the forum for such briefing. To the extent the Court
 5 considers Defendant’s arguments to be a motion to stay discovery and to limit the scope of
 6 discovery, Plaintiff must be permitted the opportunity to file an opposition to Defendant’s
 7 putative motions.

8 Plaintiffs believe that discovery will be required regarding the following subjects:

- 9 1) Who AWS peered with and why;
- 10 2) Who AWS refused to peer with and why;
- 11 3) Requirements/standards for peering on AWS, including how they are set and whether
 12 they have changed over time;
- 13 4) The business relationship and other interactions between AWS and Subspace;
- 14 5) The business relationship and other interactions between AWS and Epic (including
 15 after Subspace went out of business);
- 16 6) The business relationship and other interactions between Epic and Subspace;
- 17 7) AWS's knowledge about the contract between Epic and Subspace;
- 18 8) Damages caused by AWS’s refusal to peer – to both Subspace and Epic;
- 19 9) Damages caused by AWS’s interference with the business relationship between Epic
 20 and Subspace;
- 21 10) Information regarding the withdrawal of any companies from using AWS as their
 22 cloud provider, including, but not limited, to the identity of such companies, the revenues AWS
 23 earned from those companies, and the dates of their departures;
- 24 11) Information related to direct and indirect exit fees to leave the AWS network,
 25 including, but not limited to, how they are set, how often they are charged, and to which firms;
- 26 12) Information and analyses related to AWS’s gross and net revenues;

1 13) Information and analyses related to gross and net revenues for each AWS line of
2 business, service, or product, including, but not limited to, AWS Direct Connect, AWS Global
3 Accelerator, and any other AWS service proving network optimization;

4 14) Information and analyses related to the respective market shares of cloud computing
5 platforms;

6 15) Information and analyses related to AWS's share of Amazon.com, Inc.'s overall
7 profitability;

8 16) AWS analyses (whether internal or external) of whether AWS peering is, or should
9 be considered as, a common carrier or telecommunications service, including any AWS analyses
10 of the pending FCC Open Internet Notice of Proposed Rulemaking;

11 17) The means by which AWS offers peering to potential users;

12 18) Documents describing how AWS markets and sells peering;

13 19) Identity of any telecommunications carriers or common carriers that use AWS's
14 peering;

15 20) The AWS onboarding process for users of its peering. AWS policies and practices for
16 negotiating contracts for peering, including any standard terms and conditions or boilerplate
17 contracts;

18 21) Information regarding any alterations made by or on behalf of AWS to the form or
19 content of the information sent or received by the AWS customer or user via peering;

20 22) Information related to any functions provided by AWS peering other than the
21 transmission or routing of information, including, but not limited to, network optimization, DNS
22 translation, storage, or caching;

23 23) Any changes caused by the transmission component of peering to the form or content
24 of the information sent or received by the AWS customer or user; and

25 24) Information related to consumers' perception of AWS's peering.
26

1 Defendant's Statement

2 AWS believes discovery should not commence until after the Court rules on AWS's
 3 pending Motion to Dismiss, ECF No. 23 ("Motion"). AWS's Motion is dispositive of Subspace's
 4 entire case, which is based on a business relationship in the Middle East, and can be resolved
 5 without additional discovery. Even if the Motion is granted in part, it will significantly reduce
 6 the scope of discovery, which otherwise will be extremely costly and burdensome, particularly
 7 because of Subspace's antitrust claims. The Supreme Court and Ninth Circuit have recognized
 8 the high costs of discovery in antitrust matters and have consistently emphasized that such costs
 9 should be avoided in these cases unless the operative pleading survives dismissal. *See Bell Atl.*
 10 *Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (collecting sources warning against imposing
 11 the high costs of antitrust discovery when complaint cannot survive); *Rutman Wine Co. v. E. & J.*
 12 *Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("In antitrust cases [a stay of discovery pending
 13 a motion to dismiss] especially makes sense because the costs of discovery in such actions are
 14 prohibitive."); *see also In re Graphics Processing Units Antitrust Litig.*, 2007 WL 2127577, at
 15 *5 (N.D. Cal. July 24, 2007) (granting stay in antitrust case because "adjudicating the motions to
 16 dismiss will shed light on the best course for discovery"). If Subspace intends to proceed with
 17 discovery or if the Court is inclined to put a scheduling order in place now, AWS is prepared to
 18 file a motion to stay discovery.²

19 If the case ultimately proceeds to discovery, however, AWS anticipates conducting
 20 discovery on subjects regarding the claims and defenses asserted in the case, including at least:
 21 (1) Subspace's attempts to connect to the AWS network and other networks; (2) Subspace's

22 _____
 23 ² AWS's positions in Sections 6.B and 6.E are not motions, "extensive legal argument[]," or "briefing," as
 24 Subspace asserts. AWS directs the Court to a limited number of cases in support of its positions and is prepared to
 25 fully brief these issues if necessary.

26 AWS made multiple requests to set a time for the parties to simultaneously exchange written positions on
 disputed issues this week. Subspace ignored those requests, and now insists that it should have received AWS's
 positions in writing several days before Subspace provided its own positions in writing. AWS explained during the
 26(f) conference its position that discovery should begin after the pending Motion is decided. Subspace had ample
 time to explain its own positions to the Court.

1 agreements with Epic Games; (3) the type, operation, functionality, and performance of network
2 connections and network optimization services; (4) competition for the provision of cloud
3 services and network connections; (5) the purported damages sought by Subspace and its efforts
4 to mitigate those damages.

5 Plaintiff's Response

6 It is likely that Plaintiff will be filing an Amended Complaint as of right pursuant to
7 FRCP 15(a) no later than April 29, 2024. Plaintiff is willing to hold off serving any discovery
8 until then so that Defendant may file an appropriate motion to stay discovery by that date.

9 **C. Electronically Stored Information**

10 The parties intend to discuss some adjustments to the Western District of Washington's
11 Model Agreement re: Discovery of ESI and to submit an ESI Protocol to the Court for its
12 approval.

13 Subspace's ESI is controlled by Sherwood Partners, Inc. Subspace has informed AWS
14 that Subspace has access to this ESI, will be able to produce it in discovery, and will not object
15 to discovery requests for Subspace, Inc.'s ESI on the grounds that it is not in Subspace's
16 possession, custody, or control. Other than this, the parties do not currently anticipate any special
17 issues relating to ESI.

18 **D. Privilege**

19 The parties intend to discuss some adjustments to the Western District of Washington's
20 Model Stipulated Protective Order and to submit a protective order to the Court for its approval.
21 The protective order will govern the production and handling of privileged, confidential, and
22 otherwise sensitive discovery materials in this matter. It will also provide a procedure, consistent
23 with Fed. R. Evid. 502(b), for clawing back inadvertently disclosed privileged material.

24 Plaintiff's Statement

25 Plaintiff believes that there is broad public interest in how AWS operates, both by
26 consumers and by companies that use AWS. Much of the discovery in this matter revolves

1 around the interactions between AWS, Subspace, and Epic Games, which do not implicate
2 proprietary information. As a result, Plaintiff believes that the court's Stipulated Order will be
3 more than sufficient to protect any truly confidential information.

4 **E. Limitations on Discovery**

5 Plaintiff's Statement

6 For the reasons expressed and based upon the discovery identified in Sections 1 and 6.B,
7 *supra*, as well as the complexity of this action, Subspace believes that the following minor
8 deviations from the limitations on discovery under the Federal Rules and the Local Rules are
9 necessary. Contrary to Defendant's view, this case will not be resolved without discovery into
10 the complex issues raised in Plaintiff's Complaint. Far from being a "straightforward case about
11 a single contract," this is a case regarding Amazon's pattern and practice of trying to manipulate
12 and exploit its power over its network to force captive customers like Epic Games to utilize only
13 Amazon owned and inferior optimization services to reduce latency. In fact, the real contracts at
14 issue in this case are those between Amazon and Epic Games, which precluded Epic from using
15 any other network or server to host its popular multi-player game, Fortnite, and the contracts
16 between Epic Games and Subspace, with which Amazon interfered in its attempt to strengthen
17 its monopoly in the optimization of services for gaming platforms on the Amazon network.

18 This case will require an investigation into Amazon's treatment of other companies that
19 attempted to service Amazon's customers in areas in which Amazon was attempting to develop
20 its own captive services. Given that this is a complex case, involving not only the immediate
21 parties to the action, but also employees of Epic Games and other companies with which AWS
22 engaged in peering and with which AWS refused to engage in peering, the typical FRCP
23 limitations on depositions and interrogatories are insufficient. Plaintiff will be glad to provide a
24 more explicit "particularized showing" of need in appropriate briefing on this issue.
25
26

Depositions – Limit of 20 depositions (exclusive of experts) of which any Rule 30(b)(6) deposition and up to 4 designated “Important Witnesses” may last up to two days of seven hours (the rest will be subject to the default of seven hours under the Federal Rules);

Interrogatories – 50 interrogatories

Defendant’s Statement

AWS does not believe this case warrants any deviation from the limitations on discovery under the Federal Rules and Local Rules. Far from proposing “minor” adjustments, Subspace seeks to *double* the limitations under the Federal Rules of 10 depositions and 25 interrogatories per side. Those limitations—as well as the limitation protecting deponents from sitting for multiple days of a deposition—are appropriate here, and Subspace offers no meaningful argument to the contrary.

For the reasons expressed in Sections 1 and 6.B, *supra*, this is a straightforward case about a single contract with a single customer that Subspace alleges it had to terminate. Subspace admits that the focus of its discovery will be the contracts at issue in the narrow relationship among AWS, Epic Games, and Subspace. Its vague reference to discovery related to “other companies” does not make a particularized showing or explain the specific need for imposing the burden of discovery in excess of the limits in the Federal Rules. *See, e.g., Heggem v. Monroe Correctional Complex*, 2012 WL 4369299, at *2 (W.D. Wash. Sept. 24, 2012) (denying motion to compel responses to more than 25 interrogatories).

F. Discovery-Related Orders

As noted above, the parties anticipate seeking approval of an ESI order and protective order. The parties do not anticipate proposing any other discovery-related orders at this time.

7. Items Set Forth in Local Civil Rule 26(f)(1)

A. Prompt Case Resolution

The parties are aware of the benefits of early resolution but have not engaged in settlement discussions at this time.

1 **B. Alternative Dispute Resolution**

2 AWS believes any form of ADR is premature while its Motion to Dismiss is pending.
3 The parties have discussed the possibility of engaging in ADR such as mediation at a later point
4 in time.

5 **C. Related Cases**

6 The parties are not aware of any related cases.

7 **D. Discovery Management**

8 See *supra*, Section 6.

9 **E. Anticipated Discovery**

10 See *supra*, Section 6.B.

11 **F. Phasing Motions**

12 The parties do not anticipate the need to phase motions at this time.

13 **G. Preservation of Discoverable Information**

14 See *supra*, Section 6.C.

15 **H. Privilege**

16 See *supra*, Section 6.D.

17 **I. Model Protocol for Discovery of ESI**

18 See *supra*, Section 6.C.

19 **J. Alternatives to Model Protocol**

20 See *supra*, Section 6.C.

21 **8. Date Discovery Will Be Completed**

22 As discussed in Section 6.B, the parties disagree on when discovery should begin.
23 Otherwise, the parties have agreed on an appropriate discovery schedule in the case. The parties
24 propose that the discovery period last 11 months.

25 **9. Bifurcation**

26 The parties do not believe that bifurcation of issues would be necessary or helpful.

1 **10. Pretrial Statements and Pretrial Order**

2 The parties intend to comply with, and not dispense with, pretrial statements and the
3 pretrial order called for by LCR 16 and 16.1.

4 **11. Individualized Trial Program**

5 The parties do not intend to use the Individualized Trial Program options set forth in LCR
6 39.2.

7 **12. Alternative Dispute Resolution Options**

8 The parties do not intend to use the ADR options set forth in LCR 39.1.

9 **13. Shortening or Simplifying the Case**

10 At this time, the parties do not have further suggestions for shortening or simplifying the
11 case.

12 **14. Trial Date**

13 As discussed in Section 6.B, the parties disagree on when discovery should begin and
14 therefore when subsequent case deadlines would occur. But the parties agree that the case can be
15 ready for trial, if necessary, 19 months after discovery begins. This would include 11 months for
16 fact and expert discovery, *see supra*, Section 8; four months for the parties to brief summary
17 judgment and *Daubert* motions; and four months from the completion of briefing those motions
18 to the trial date, in line with the Court's Non-Patent Civil Trial Scheduling Template.

19 The parties believe that this is an aggressive schedule that reflects some additional time
20 beyond the Court's template schedule to allow for the kind of expert discovery and associated
21 *Daubert* briefing that is often required in antitrust cases.

22 **15. Jury or Non-Jury Trial**

23 The parties disagree about this topic.

24 Plaintiff's Statement

25 Plaintiffs have demanded a jury trial of this matter, to which they are entitled under the
26 U.S. Constitution. Subspace does not believe that any Customer Agreement as asserted by AWS

1 was entered into by Subspace. Even if someone at Subspace entered into any such agreement,
 2 based upon Plaintiff's understanding of those general online terms of service that it has
 3 reviewed, those service terms have no application to the claims in Plaintiff's Complaint.

4 At best, AWS "believes" that "Subspace has waived its right to a jury trial in this case."
 5 AWS has provided no evidence to support that contention. Instead, AWS claims that Subspace
 6 "must have" entered into this "type" of a contract but cannot establish the terms or the specific
 7 contract to which Subspace allegedly entered. As AWS has stated

8 The link [AWS Counsel] provided is to the language of a contract (not merely
 9 general terms of service) that AWS enters into with some of its customers. We are
 10 continuing to investigate Subspace's use of AWS's services to identify the
 11 specific contract that is operative here, but based on our investigation to date we
 12 understand that Subspace agreed to be bound by the AWS Customer Agreement
 and that the contract accepted by Subspace included a jury waiver clause either
 identical to or not materially different from the one in the contract we have
 pointed you to.

13 Email from A. Freedman to T. Urban (4/18/2024). This is not a sufficient basis upon which to
 14 deny Subspace its constitutional right to a jury trial, even were such a clause applicable to
 15 Subspace's antitrust and other non-contract claims.

16 Defendant's Statement

17 Subspace has waived its right to a jury trial in this case. The Customer Agreement
 18 entered into between Subspace and AWS included a waiver by both parties of their right to a jury
 19 trial on any claim relating in any way to Subspace's use of any AWS services. The agreement
 20 applies here and AWS intends to enforce its agreement with Subspace.

21 AWS has provided Subspace with a copy of the current text of the AWS Customer
 22 Agreement.³

23 **16. Number of Trial Days**

24 Plaintiff's Position: 15 days

25
 26 ³ See <https://aws.amazon.com/agreement/>. While Subspace's block quote is represented accurately,
 Subspace otherwise puts quotation marks around statements that neither AWS nor its counsel have made.

Defendant's Position: 5 days

17. Trial Counsel

Plaintiff's Counsel

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18. Trial Date Conflicts

The parties do not currently have any conflicts that the Court needs to be aware of.

19. Service

AWS was served on February 6, 2024. It is the only defendant.

20. Scheduling Conference

The parties request a scheduling conference to resolve the several disputes presented in this Joint Status Report. The parties suggest that the conference be held remotely by telephone or videoconference.

21. Corporate Disclosure Statements

Subspace filed its Rule 7.1 Corporate Disclosure Statement on November 27, 2023, ECF No. 6. AWS filed its Rule 7.1 Corporate Disclosure Statement on February 16, 2024, ECF No. 17.

22. Certification Regarding Applicable Rules

The parties' counsel certify that they have reviewed Judge Lin's chambers procedures, the Local Rules, General Orders, and the applicable Electronic Filing Procedures.

23. Certification Regarding Standing Order

The parties' counsel certify that they have reviewed and complied with Judge Lin's Standing Order Regarding 28 U.S.C. § 455 and Canon 3 of the Code of Conduct for United States Judges.

1 Dated: April 19, 2024

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